

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-472

GABRIEL BRIAN NOCK,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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RECEIVED, 05/31/2017 02:08:31 PM, Clerk, Supreme Court

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Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was Appellee and Respondent was Appellant in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

A copy of the published opinion issued by the Fourth District Court of Appeal is attached in the Appendix. Nock v. State, 211 So. 2d 321 (Fla. 4th DCA 2017)

Statement Of The Case And Facts

Noting that in determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion, Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1988), and Reaves v. State, 485 So. 2d 829 (Fla. 1986), respondent would direct this court to the the extensive facts of the case as presented in the opinion from the Fourth District Court of Appeal. Respondent would stress the following which is taken directly from the opinion of the Fourth District Court of Appeal outlining the facts relevant to the issue here. Nock v. State, 211 So. 3d 321 (Fla. 4th DCA 2017).

The defendant also filed a motion seeking to require the State to admit the entire video recording of the defendant's statement into evidence, under the best evidence rule and the rule of completeness. The trial court denied the request, specifically finding the rule of completeness inapplicable because the State did not offer the video into evidence. The court stated that if the desired portions of the statements were elicited when the defense cross-examined the detective, then section 90.806(1), Florida Statutes (2014), allowed the State to use the defendant's prior convictions for impeachment.

The defendant later renewed his rule of completeness objection during the State's direct examination of the detective; the court denied the motion. During a sidebar, the State suggested that the defendant was free to introduce the video in his portion of the case. Rather than do so, the defense cross-examined the detective regarding the exculpatory portions of the defendant's statement, which supported his defense of the victim's death being an accident.

As a result, the jury was later advised of the defendant's "nine prior convictions of felonies or crimes involving dishonesty." The trial court instructed the jury that the prior crimes were not evidence of guilt and should only be used in assessing the defendant's credibility.

Nock, 211 So. 3d at 323

Summary Of The Argument

This Court does not have jurisdiction to review the instant case. The Fourth District Court of Appeal opinion in the instant case, does not expressly and directly conflict with Foster v. State, 182 So. 3d 3 (Fla. 2nd DCA 2015). Therefore, this Court should deny discretionary review of the case at bar.

Argument

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IS NOT IN CONFLICT WITH FOSTER V. STATE, 182 So. 3d 3 (Fla. 2nd DCA 2015)

Article V, § 3(b)(3) of the Florida Constitution restricts this Court's review of a district court of appeal's decision only if it **expressly** conflicts with a decision of this Court or of another district court of appeal. It is not enough to show that the district court's decision is effectively in conflict with other appellate decisions. However, this Court's jurisdiction to review the Fourth DCA's decision in this case may be invoked by either the announcement of a rule of law which conflicts with a law previously announced by this Court or another district court of appeal or by the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court as mandatory authority. See generally Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[if] the two cases are

distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict cannot arise." Id. at 887.

When determining whether conflict jurisdiction exists, this Court is limited to the facts which appear on the face of the opinion. Hardee v. State, 534 So. 2d 706, 708 n. 1 (Fla. 1986). In the past, this Court has held that it would not exercise its discretion where the opinion below established no point of law contrary to the decision of this Court or of another district court of appeal. The Florida Star v. B.J.F., 530 So. 2d 286, 289 (Fla. 1988). "'Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." State Department of Health v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (quoting Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)).

Petitioner argues that the Fourth District's opinion in Nock v. State, 211 So. 3d 321 (Fla. 4th DCA 2017) is in conflict with the decision of the Second District in Foster v. State, 182 So. 3d 3 (Fla. 2nd DCA 2015). The State asserts that conflict is not present as the cases are clearly distinguishable.

In Foster a police officer stopped Foster near a parked vehicle at 2 a.m as he was acting in a suspicious manner. Foster agreed to a consent search that revealed a "wallet containing a social security card that belonged to an individual who had reported it stolen." Id. During direct examination of the officer at trial "it was the State that first elicited testimony from the officer that Foster said he found the

wallet.” Id. “During cross examination, the officer went on to testify that Foster had told him he found the wallet inside of a garbage can and that he was going to turn it in to police as found property.” Based on this cross examination the State argued “that because the defense introduced exculpatory statements during the officer’s cross-examination, the State was entitled to introduce into evidence certified copies of Foster’s eleven prior convictions.” Id. The Second District reversed finding the admission of the certified copies of the prior felonies was error. Central to the court’s decision in Foster was the fact that the State, on direct examination of the officer, first presented portions of the exculpatory statements Foster made to police. The Court concluded that in presenting this partial exculpatory testimony the State opened the door to “the whole story of a transaction only partly explained in direct examination.” Id. Foster revolved around the concept of opening the door and did not reference the rule of completeness discussed in Nock. There was no video recorded statement involved in Foster.

In stark contrast, Nock involves a Mirandized video recorded statement Nock gave to police at the police station. The State did not play the recorded statement at the trial. The State presented the detective who took Nock’s statement to testify regarding what Nock had said. Nock had “filed a motion seeking to require the State to admit the entire video recording of the defendant’s statement, under the best evidence rule and the rule of completeness.” Nock v. State, 211 So. 3d 321, 323 (Fla. 4th DCA 2017). The motion was denied and after the State presented the testimony of the detective regarding Nock’s statement, it was pointed out at sidebar that Nock

was free to play the entire statement to the jury. The defense declined and then cross examined the detective regarding the “exculpatory portions of the defendant’s statement which supported his defense of the victim’s death being an accident. As a result, the jury was later advised of the defendant’s ‘nine prior convictions of felonies or crimes involving dishonesty.’” Id.

Nock is very different from Foster. As noted earlier Nock involves a video recorded Mirandized statement to police after his arrest. In Foster there is no such recording. Foster involves the scope of cross examination after the State first provides testimony regarding the defendant’s exculpatory statements to police. The Foster court held that if the State offers such testimony on direct examination this opens the door to clarifying cross examination regarding the scope of the exculpatory statements without risking impeachment with prior convictions. In Nock the argument arose from an assertion of the rule of completeness—not the scope of cross examination which was never at issue in Nock. In Nock there is no indication that the testimony of the detective regarding Nock’s recorded statement offered any suggestion regarding any exculpatory utterance from Nock. The exculpatory portion of Nock’s statement was first brought out by the defense during the cross examination of the detective. In Foster the defendant was impeached with the admission of certified copies of eleven prior convictions. In Nock the impeachment involved advising the jury of the nine prior convictions of felonies or crimes involving dishonesty. In Nock the jury was also instructed “that the prior crimes were not evidence of guilt and should only be used in assessing the defendant’s credibility.”

Nock v. State, 211 So. 3d 321, 323 (Fla. 4th DCA 2017). Foster is very distinguishable from Nock. The Fourth District Court of Appeal was simply incorrect in suggesting Nock was in conflict with Foster.

Accordingly, this Court should decline to review the lower court's decision in this case.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court should decline to accept jurisdiction.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been to Ian Seldin, Assistant Public Defender, 421 Third St, 6th floor, West Palm Beach, FL. 33401 at appeals@pd15.state.fl.us and filed with this court through the portal at myflcourtaccess.com on May 31, 2017.

/s/ Don M. Rogers

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Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

/s/ Don M. Rogers

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